No. 84-902

In the Supreme Court of the United States

OCTOBER TERM, 1985

WARDAIR CANADA INC., APPELLANT
v.
FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

BRIEF FOR
AIR JAMAICA LIMITED, a foreign corporation;
AEROVIAS COLOMBIANAS LIMITADA, a foreign corporation;
CARIBBEAN AIR CARGO CO., LTD., a foreign corporation;
GUYANA AIRWAYS CORPORATION, a foreign corporation;
LINEAS AEREAS del CARIBE, S.A., a foreign corporation;
TACA INTERNATIONAL AIRLINES, S.A., a foreign corporation;
COMPANIA PERUANA de AVIACION "FAUCETT," S.A.,
a foreign corporation;
AERONAVES del PERU, S.A., a foreign corporation;
and
TRANSPORTES AEREOS MERCANTILES
PANAMERICANOS, S.A., a foreign corporation
AS AMICUS CURIAE.

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QUESTIONS PRESENTED

I. Whether Florida's tax on aviation fuel is at variance with federal policy because it violates the "one voice standard" by contradicting a clear federal directive and implicating foreign policy issues which must be left to the federal government.

A. A clear federal directive which evinces a uniform national rule prohibits individual states from taxing the sale of aviation fuel that is used by foreign instrumentalities exclusively in foreign commerce.

B. Florida's tax on aviation fuel implicates foreign policy issues which must be left to the federal government.

II. Whether the United States government is obligated to foreign nations to grant reciprocal tax exemptions for fuel purchased in the United States by foreign airlines domiciled in foreign countries pursuant to valid international bilateral agreements.

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BRIEF FOR AIR JAMAICA LIMITED, et al. AS AMICUS CURIAE

This brief is filed with written consent of Wardair Canada, Inc., Appellant and Florida Department of Revenue which consents have accompanied this brief.

INTEREST OF AMICUS CURIAE

Amicus Curiae, hereinafter Amicus, is composed of a group of foreign air carriers established under the laws of foreign countries and having their principal place of business outside the United States. The nations in which they are domiciled are located in Central America (El Salvador), South America (Columbia, Guyana, and Peru), and the Caribbean (Jamaica and Barbados). Each Amicus has been found by the

Civil Aeronautics Board to be owned and effectively controlled by the government or nationals of its home country. Three of Amicus, Air Jamaica Ltd., Caribbean Air Cargo, Co., Ltd., and Guyana Airways Corp. are owned or substantially owned by their respective governments of domicile.

Each Amicus has been designated by its home government to provide international air transportation to and from the United States from various points outside of the United States. Aviation relations between the United States and each of Amicus' home governments is governed, inter alia, by a multilateral aviation agreement, Convention on International Civil Aviation T.I.A.S. No. 159, 61 Stat. 1180, et seq. All Amicus' home governments have entered into bilateral aviation service agreements with the United States. However, Peru's agreement expired on November 12, 1983. Negotiations for a new agreement has commenced.

Amicus have pending before this court its Jurisdictional Statement filed December 11, 1984 (Case No. 84-1041) having questions presented substantially the same as Appellant Wardair Canada, Inc.

ARGUMENT

I. FLORIDA'S TAX ON AVIATION FUEL IS AT VARIANCE WITH FEDERAL POLICY BECAUSE IT VIOLATES THE "ONE VOICE STANDARD" BY CONTRADICTING A CLEAR FEDERAL DIRECTIVE AND BY IMPLICATING FOREIGN POLICY ISSUES WHICH MUST BE LEFT TO THE FEDERAL GOVERNMENT.

Article I, Section 8, Clause 3, of the United States Constitution provides that Congress shall "regulate commerce with foreign nations and among the several states." The

commerce clause acts as a limitation upon a state's power to tax. Although interstate commerce is not immune from taxation, when the tax operates to regulate commerce between the states to an extent that interferes with the authority conferred on Congress the tax exceeds constitutional limits.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), this Court set forth a four prong test under which local tax laws are scrutinized. A tax on interstate commerce cannot be sustained unless the tax: (1) Is applied to an activity with a substantial nexus with the taxing state; (2) Is fairly apportioned; (3) Does not discriminate against interstate commerce; and (4) Is fairly related to services provided by the state. *Complete Auto Transit*, 430 U.S. at 287. A state tax which impacts on interstate commerce and fails to withstand scrutiny under any of the four prongs stated in *Complete Auto Transit* is unconstitutional.[1]

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[1]Senate Bill 8A, fails to meet at least one of the four prongs of the *Complete Auto Transit* test. Senate Bill 8A creates a road-user tax on interstate commerce. If the legislature had enacted the tax on road users, this tax would sustain a challenge under the four prong test. However, the legislature created a road-user tax on air carriers who do not use the highway system in Florida.

Once the revenues are received from the tax in question, they are deposited into the Gas Tax Collection Trust Fund authorized by Fla. Stat. §206.45 (1983). After deduction and refunds for service charges, all but $2,800,000 annually is transferred to the State Transportation Trust Fund. The $2,800,000 is transferred to the Department of Natural Resources to be used for ". . .eradication of, control of, and research of water hyacinths and noxious aquatic vegetation." FLA. STAT. §212.69(3)(1983).

Based on the statutory accounts of the State Transportation Trust Fund found in Fla.Stat. §339.081(1983), the tax revenues accrue solely to the Division of Road Operations of the Department of Transportation. Monies accruing to the Division of Road Operations shall be restricted to the following purposes: construction of roads, maintenance of roads, preliminary engineering plans, compensation of certain employees of the Division of Road Operations and administrative expenses. FLA. STAT. §339.08 (1983). Thus, Senate Bill 8A fails to pass the fourth prong of

In addition to the four prong test stated in *Complete Auto Transit*, this Court has identified two additional concerns in foreign commerce cases: The risk of international multiple taxation between the various foreign governments and the United States; and the risk of state interference with uniform national foreign policy which prevents "the federal government from speaking with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) [hereinafter referred to as *Japan Line*].

Although the aviation fuel sales tax imposed by the state of Florida does not create the risk of international multiple taxation between the various foreign governments and the United States, the first prong of *Japan Line*, the tax interferes with uniform national foreign policy, thus violating the second prong of *Japan Line*.

In *Container Corporation of America v. Franchise Tax Board*, 103 S.Ct. 2933 (1983), this Court had occasion to apply the *Japan Line* extension of *Complete Auto Transit* to a corporate franchise tax geared to income imposed by the state of California on a corporation domiciled and headquartered in the United States. Although the issue presently before the court differs greatly in that here the Florida tax is imposed on aviation fuel used by companies domiciled and headquartered in foreign countries, *Container Corp.* does help to clarify the reach of the two prong *Japan Line* test concerning the foreign commerce clause.

This Court found in *Container Corp.* that the second prong of the *Japan Line* itself consists of a two part inquiry: "[A] state tax at variance with federal policy will violate the

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Complete Auto Transit test because after tracing the flow of the tax revenues through the various statutory trust funds, no provisions are made for aviation related purposes. The fourth prong of the *Complete Auto Transit* test, requires that the tax be related to the services provided by the state. Here the services are for the use of roads and not airports.

"one voice" standard if it *either* implicates foreign policy issues which must be left to the federal government *or* violates a clear federal directive." *Container Corp.*, 103 S.Ct. at 2955 (emphasis in original).

The above language indicates clearly that a state tax is violative of the *Japan Line* "one voice" standard if either condition is present. In this case, both parts of the "one voice" standard are impinged upon by the State of Florida's 5.7 cents per gallon tax on aviation fuel used by foreign instrumentalities in foreign commerce. That is, this tax violates a clear federal directive, and further, it implicates foreign policy issues that must be left to the federal government.

A. A Clear Federal Directive Which Evinces A Uniform National Rule Prohibits Individual States From Taxing The Sale Of Aviation Fuel That Is Used By Foreign Instrumentalities Exclusively In Foreign Commerce.

This Court in *Japan Line* was faced with the narrow issue "whether instrumentalities of commerce that are owned, based, and registered abroad, and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a state." *Japan Line*, 441 U.S. at 444. It is obvious that the issue presently before the court is almost identical. Florida has imposed a sales tax on aviation fuel sold to instrumentalities of commerce which are foreign owned, foreign based, and foreign registered. Furthermore, the aircraft at issue are used exclusively in international commerce. The only real difference between the two cases is that the tax in *Japan Line* was apportioned and the Florida tax is not.

In *Japan Line*, the Court found that the tax prevented the federal government from "speaking with one voice in regulating trade." 441 U.S. at 452. The Court discussed the

federal government's uniform treatment of containers used exclusively in foreign commerce and recognized the importance of the Customs Convention on Containers, which the United States and Japan had signed. *Id.* at 453. The Court stated that "[t]he convention reflects a national policy to remove impediments to the use of containers as 'instrumentalities of international traffic.'" *Id.* (citation omitted).

In the area of foreign air transportation, Congress through treaties, bilateral agreements resulting from treaties, informal arrangements, and federal statutory provisions, has preempted state taxation of aviation fuel used exclusively by foreign instrumentalities solely in foreign commerce. The evidence that this Court found persuasive in *Japan Line* concerning a strong national policy in the treatment of containers embodied in the Container Convention, is much stronger in the present case. Reading together the actions of Congress and the executive branch in the area of regulating foreign air transportation leaves little doubt that the Florida tax violates a clear federal directive.

The federal government's uniform treatment of the taxing of aviation fuel used exclusively by foreign instrumentalities in foreign commerce is evidenced by the 1944 Chicago Convention of International Civil Aviation. Under this convention the United States and 156 other nations are committed to the implementation of various agreements and plans to improve international air transportation. Especially relevant to the issue presented is Article 24(a); "Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting state, on arrival in the territory of another contracting state and retained on board on leaving the territory of that state shall be exempt from customs duty, inspection fee or similar national or local duties or charges." (61 Stat. 1186). Although Article 24(a) is expressly limited to aviation and fuel supplies that are on board an aircraft upon its arrival and kept on the aircraft upon departure, the policy of reciprocal exemptions embodied in this section has had a far reaching effect in bringing about agreements

aimed at eliminating discriminatory treatment of foreign instrumentalities.

The main force in attempting to eliminate taxation on the sale or use of the instrumentalities of air travel has been the International Civil Aviation Organization (ICAO). The creation of ICAO at the Chicago Convention was the beginning of many years of research, negotiations, and policy making by the organization. In 1966, the ICAO Council adopted the following resolution:

> [F]uel, lubricants, and other consumable technical supplies taken on board [an aircraft] for consumption during [an international] flight shall be furnished exempt from all customs and other duties or, alternatively, any such duties levied shall be refunded. . . .

Almost all of the nations that participated in the Chicago Convention have implemented the above reciprocal agreement. Thus, these nations exempt aviation fuel purchased by foreign airlines from taxes, including sales, use, and excise taxes.

The United States, since the 1944 Chicago Convention, has signed bilateral aviation agreements with more than 70 foreign countries, including amicus. (For a full discussion of the import of these agreements, see *infra*, p. 15-22).

Congress has been very active in its regulation of foreign commerce, especially in the area of air transportation. The Court in *Container Corp.* failed to find congressional intent to preempt the tax area at issue. One of the reasons given by the Court was that there existed no federal tax statutes that provided preemptive force. *Container Corp.*, 103 S.Ct. at 2956. In the present case, there are several pieces of legislation which provide ample evidence that Congress has preempted the regulation of foreign air travel.

By treaty or other international agreement and by the terms of the permits issued them by the United Civil

Aeronautics Board (hereinafter Board), pursuant to 49 U.S.C. §1372, foreign carriers may only operate in foreign commerce. These operating permits prohibit the carriers from engaging in commerce solely within the nation's borders. The permits are also governed by the regulations found at 14 C.F.R. §375.42. Part (b)(2) of that section emphasizes that Congress intended the Board to "permit such operations only where conditions of reciprocity and the interest of the public in the United States are met."

The Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq., is clearly a congressional enactment based on commerce clause powers, as is the International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. §1151 et seq., entirely based on foreign commerce powers of Congress. U.S. carriers engaged in reciprocal commerce with foreign nations "perform services of vital importance to the foreign commerce of the United States including its balance of payments, to the Postal Services, and to the national defense." 49 U.S.C. §1159b(a).

The federal government has completely preempted the regulation of the use of American airspace and the manner through which it may be passed. 49 U.S.C. §1348(a) and (c). Foreign air carriers are permitted, pursuant to the terms of 49 U.S.C. §1372, to utilize this national soverign airspace, 49 U.S.C. §1508(a). Such permits are subject to the Board's exclusive discretion regarding terms, conditions or limitations, 49 U.S.C. §1372(e), subject to their being consistent with relevant treaties, conventions and other foreign agreements, 49 U.S.C. §1502(a), and fulfilling the goals of United States International Air Transportation Policy as set forth in 49 U.S.C. §1502(b). An express element of this national foreign policy is elimination of operational and marketing restrictions. 49 U.S.C. §1502(b)(5).

Congress has thus exercised its constitutional power "to regulate commerce with foreign nations." Article 1, Section 8, Clause 3. It is a founding organic principle of this republic that:

> The words of the Constitution "comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend." *Gibbons v. Ogden*, 9 Wheat. 1, 193, 6 L.Ed. 23. It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action.
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> * * *
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> The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.

Board of Trustees of University of Illinois v. United States, 289 U.S. 48, 56-5, 53 S.Ct. 509, 510 (1933).

Congress, by exercising its exclusive plenary power and vesting certain discretion in the executive branch, has extensively regulated and occupied this nations dealings with foreign air carrier commerce. The foreign airlines and their nations' governments deal with one federal government, not 50 state governments. As far as foreign air commerce is concerned, there are no states. Federally designated cities, not states are ports of entry into this nation and are designated without seeking state consent. 49 U.S.C. §1509(b). In reality there is no real question of preemption because there is nothing to preempt; the Constitution mandates that this field belongs exclusively to the federal government.

There is no Florida airspace. The airspace over Florida is under the exclusive soverign control of the federal government. 49 U.S.C. §1508(a).

While states may impose reasonable burdens on domestic interstate commerce, they are prohibited completely from

burdening foreign commerce. The operations of foreign air carriers, in their absolute entirety, are matters of foreign commerce. Congress has no lawful ability to share its constitutionally exclusive power regulating foreign commerce with the states, unlike the permissible sharing of power regarding interstate commerce.

This Court has recognized that a state tax may have foreign policy implications other than the threat of retaliation. *Container Corp.* 103 S. Ct.at 2956. Although not dispositive, this Court noted in *Container Corp.* that the executive branch had decided not to file an *Amicus Curiae* Brief opposing the states taxes. *Id.* at 2956. Submission of a brief by the executive branch evidences the impact the state's action at issue has in the area of foreign affairs. Here, a brief for the United States as amicus curiae was filed by the Solicitor General which has expressed views of the executive branch of the United States. The Solicitor General illustrates the pervasive federal regulation in this area:

> This nation's aviation relations with foreign governments are implemented through a comprehensive network of treaties, bilateral executive agreements, informal arrangements, and federal statutory provisions. *The pattern produced by these varied strands, a pattern to which the federal government has long been committed, is one of reciprocal tax exemptions for aircraft, equipment and supplies, including aviation fuel, that constitute the instrumentalities of international air traffic. (e.s.)* Due in part to our nation's advocacy, this pattern has become the accepted international norm in the aviation field, a concensus that reflects the longstanding custom of nations in international maritime trade.

Brief for the United States of Amicus Curiae, September 1985 at 10.

Clearly, the position of the executive branch of the United States is that aviation fuel constitutes instrumentalities of international aviation and is tax exempt based on reciprocity. Thus, the position of the United States has been made available to this Court, unlike the case of *Container Corp.* Also, unlike *Container Corp.*, but as in *Japan Line*, the executive branch is opposed to the tax as applied to appellant and amicus herein because of the far reaching, detrimental ramifications of this kind of tax on foreign relations and foreign trade policy.

In addition, the executive branch has expressed its disapproval of Florida's tax as applied to the foreign air carriers through correspondence with the State Department to Florida. In 1982 the State Department wrote to the taxing officials in Florida expressing concern that Florida was considering a tax on aviation fuel. After the enactment of the aviation fuel tax, the State Department, somewhat surprised and distressed, again wrote the taxing officials of Florida, questioning Florida's decision to enact this tax without an exemption based on reciprocity. The State Department stressed that failure to exempt the foreign air carriers would no doubt result in serious foreign relations problems. (*See* Brief for the United States as Amicus Curiae, September 1985 at 20, 21).

Congress, by ratifying the 1944 Chicago Convention and by passing legislation involving the Civil Aeronautics Board has demonstrated clearly its intent to preempt state action in the area of foreign air transportation. Federal preemption is further evidenced by the action and the interest of the executive branch in this area. In general, the executive branch has entered into various treaties and international agreements concerning foreign air travel. More specifically, the State Department attempted to point out to Florida its error in not exempting foreign airlines from the tax, illustrating the executive branch's interest in this area. Finally, the Solicitor General filed a brief on behalf of the United States to emphasize the negative impact of Florida's tax in the area of

foreign relations. This Court, based on the federal government's preemption of the regulation of foreign air transportation, should find that Florida's tax on the sale of aviation fuel used exclusively by foreign instrumentalities in foreign commerce violates the foreign commerce clause. This court stressed the urgency of federal uniformity in *Japan Line*:

> [A] state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is preeminently a matter of national concern. In international relations with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.

Japan Line, 441 U.S. at 450 (citations and quotation marks omitted). Florida's taxation of aviation fuel sold to foreign instrumentalities runs directly counter to our government's uniform treatment of foreign air transportation.

In the event this Court is not convinced that the federal government has preempted this area, amicus submits that Florida is violating the "one voice" doctrine of *Japan Line* by implicating foreign policy issues and is inviting retaliation by foreign countries that will have a negative effect on our country's foreign trade.

B. Florida's Tax On Aviation Fuel Implicates Foreign Policy Issues Which Must Be Left To The Federal Government.

This Court in *Container Corp.* stated a "state tax at variance with the federal policy will violate the 'one voice' standard if it . . . implicates foreign policy issues which must be left to the federal government." *Id.* at 2955. Retaliation

against this nation as a whole, caused by a state tax which offends our foreign trading partners, is the most obvious foreign policy implication. *Id.* at 2955.

In *Japan Line* this court explained how a state tax may frustrate the achievement of federal uniformity:

> A state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If the State imposes an apportioned tax, international disputes over reconciling apportionment formulae may arise. If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general not just that of the taxing state, so that the nation as a whole would suffer. (footnotes omitted).

Id. at 1822.

The risk of retaliation by Jamaica and other foreign countries is real as evidenced by the several diplomatic messages already before this court. If Florida is allowed to tax the instrumentalities of foreign commerce, then our foreign trading partners will retaliate by taxing American owned instrumentalities present in that foreign jurisdication. The risk of retaliation is acute and will be felt by the nation as a whole. If Florida is allowed to fire the first shot in an international tax war, other forms of domestic transportation will be subjected to retaliatory taxation. As in *Japan Line*, "[Florida] by its unilateral act, cannot be permitted to place these impediments before this nation's conduct of its foreign relations and its foreign trade." *Id.* at 1824. Likewise, Florida may not tell this

nation or its foreign trading partners how to conduct foreign policy decisions.

In *Container Corp.*, the Court distinguished that case from *Japan Line* on three different points. A short discussion will show clearly that the present case, unlike *Container Corp.*, is virtually identical to *Japan Line*.

First, the Court noted that the corporation franchise tax at issue did not create automatic asymmetry. *Id.* at 2955. The Court in *Japan Line* made clear exactly what asymmetry means: "It is stipulated that American-owned containers are not taxed in Japan. California's tax thus creates an asymmetry in international maritime taxation operating to Japan's disadvantage." *Japan Line*, 441 U.S. at 453. (citation omitted). Presently, the amicus' countries do not tax aviation fuel sold to U.S. aircraft. Therefore, Florida's taxing of fuel sold to amicus works to the disadvantage of amicus' countries, creating an asymmetry found intolerable in *Japan Line*.

Second, the Court found that the California tax at issue in *Container Corp.* was imposed on a domestic entity and "not on a foreign entity as was the case in *Japan Line*." *Container Corp.*, 103 S.Ct. 2955. Clearly, the tax imposed by Florida, as in *Japan Line*, is imposed on foreign entities engaged exclusively in foreign commerce. The legal incidence of Florida's tax falls exclusively on foreign owned instrumentalities of foreign commerce. As pointed out in the brief for the United States as amicus curiae (September 1985), not only are the foreign airlines owned by foreign entities, but about half of the appellant airlines are wholly owned or substantially owned by foreign national governments (brief for the United States as amicus curiae, September 1985, at 2). Thus, Florida's tax is an indirect tax on foreign governments to the extent of ownership of the foreign airlines by foreign governments. Because the tax is an indirect tax on foreign governments, the risk of retaliation is greater than in *Japan Line* which involved a tax on a foreign non-governmental entity.

The third factor was foreign nations that may have a

legitimate interest in reducing the tax burdens of domestic corporations. In the instant case, as was in *Japan Line,* the tax is on foreign entities exclusively.

Although the above analysis of retaliation in *Container Corp.* dealt only with taxes, the risk of other forms of retaliation exists. The United States Solicitor General expressed in a footnote of his brief (September 1985, pg. 34, note 33) the specific types of retaliation. This point is more specifically addressed in amicus point II of this brief.

Clearly the tax imposed by Florida implicates foreign policy issues by creating a substantial risk of asymmetry in the tax structure of foreign commerce and taxing foreign entities engaged exclusively in foreign commerce, areas which must be left to our federal government.

Should this court disagree that Florida's tax violates the "one voice" doctrine announced in *Japan Line*, then an exemption should be granted based on reciprocity pursuant to valid international agreements.

II. THE UNITED STATES GOVERNMENT IS OBLIGATED TO FOREIGN NATIONS TO GRANT RECIPROCAL TAX EXEMPTIONS FOR FUEL PURCHASED IN THE UNITED STATES BY FOREIGN AIRLINES DOMICILED IN FOREIGN COUNTRIES PURSUANT TO VALID INTERNATIONAL BILATERAL AGREEMENTS.

Amicus curiae in this case enjoys certain privileges and immunities when conducting air transportation into the United States pursuant to valid air transport service agreements with the United States and their respective sovereign governments.

All international agreements relied on by amicus contain language similar to that found in the Jamaican-United States Air Transport Service Agreement (T.I.A.S. No. 6770) which states in Article 8 as follows:

A. Each contracting party shall exempt the designated airline or airlines of the other contracting party to the fullest extent possible under its national law, on the basis of reciprocity, from import restrictions, customs, duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants, consumable technical supplies, spare parts including engines, regular equipment, ground equipment, stores, and other items intended for use solely in connection with the operation of servicing of aircraft of the airlines of such other contracting parties engaged in international air service. The exemptions provided under this paragraph shall apply to items:

* * *

(3) Taken on board aircraft of the designated airlines of one contracting party in the territory of the other and intended for use in international service; whether or not such items are used or consumed wholly within the territory of the contracting party granting the exemption.

Further, the Jamaican-United States Protocol, Article 10 (T.I.A.S. No. 9613); Salvador-U.S. Agreement Article 9(5) (T.I.A.S. No. 10488); and Barbados-United States Agreement, Article 9(5) (T.I.A.S. No. 10370) contain similar language as follows:

> (6) Each party shall use its best efforts to secure for the designated airlines of the other party, on the basis of reciprocity, an exemption from taxes, duties, charges, and fees imposed by state, regional and local authorities specified in paragraph (a) of

> Article 8 of the Agreement of this article, as well as from fuel through put charges, in the circumstances described in Article 8 of the Agreement, except to the extent that the charges are based on the actual cost of providing the service.

Jamaican-U.S. Protocol, Article 10, T.I.A.S. 9613.

The reference in the above paragraph referring to paragraph (a) relates back to "each contracting party shall exempt. . .airlines of the other contracting party. . .under its national law. . .from excise taxes on fuel." Jamaican-U.S. Agreement, Article 8, T.I.A.S. 6770.

There are some international agreements of amicus that do not contain the specific language referenced above (Jamaican-U.S. Protocol). However, the agreements that do not contain this specific language have similar and saving language. A representative example is the Air Transport Service Agreement between the United Kingdom and the United States (Guyana Airways) states:

> Fuel, lubricating oils and spare parts introduced into, or taken on board aircraft in, the territory of one contracting party by, or on behalf of, a designated air carrier of the other contracting party and intended solely for use by the aircraft of such carrier shall be accorded, with respects to customs, duties, inspection fees or other charges imposed by the former contracting party, treatment *not less favorable than that granted to national air carriers engaged in international air services or such carriers of the most favored nation.* (e.s.).

U.K.-U.S. Agreement Article 3(2), T.I.A.S. No. 1507.

This above stated "most favorable nation clause" gives equal dignity to the remaining amicus concerning the exemp

tion of fuel to those carriers which have specific statements of reciprocal exemption from state taxes. The logical conclusion is that these foreign nations would be granted treatment no less favorable than the most favored nation when dealing with the subject of aviation fuel taxation.

By virtue of these international agreements and pursuant to the authority of the Civil Aeronautics Board, amicus are permitted to fly routes between foreign origins into specified cities (airports) in the United States. Amicus are not permitted to engage in intrastate or interstate flights within the United States and by virtue thereof never depart from foreign commerce. (See 49 U.S.C. App. 1508(6)). Many foreign governments which conduct trade and transportation relations with the United States do not have complex forms of government made up of 50 state constitutions and state laws; and one national constitution and federal laws. When foreign relations are conducted with the United States they are conducted with one national entity—the United States government. Due to the United States infrastructure of internal governments, a balance of federal versus states rights must be had and adhered to.

This Court in its opinion in *United States v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937), aptly described the balance of federal versus state responsibilities in the context of international agreements.

> Government power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution

(Article 2, Section 2), require the advice and consent of Senate.

Id. at 330.

> We held (in *Altman*, 224 U.S. 583) that although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and proclaimed under the authority of the President, and as such was a treaty within the meaning of the Circuit Court of Appeals Act (26 Stat. 826), the construction of which might be reviewed upon direct appeal to this court.

Id. at 331. The Court continued:

> In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purpose the state of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power. (citations omitted).

Id. at 331-2.

The United States, throughout its history, has had to continuously face a test of credibility. That test is even more acute in this present day world of mass media and rapid transportation. Amicus would request this court to take judicial notice of the sensitive international political environment existing in the geographic location of amicus. The

current political tensions existing in Central America and the recent vintage conflict in Granada are common knowledge and reflect our government's need to handle all matters involving this area of the world with extreme care.

This test of credibility is not a matter of speculation in the present case. The United States has received diplomatic notes from 26 foreign countries[2] protesting state taxation of aviation fuel. Several of these diplomatic notes (including Amicus Government of Columbia) reference a retaliatory tax.

The issue of credibility is the heart of the international agreements between the United States and the governments of amicus. In order for the United States government to effectively operate in its exclusive domain of foreign relations, the international agreements entered into must be honored.

The United States' failure to adhere to the international agreements permitting a state tax on aviation fuel on an instrumentality of foreign commerce would cause the nation as a whole to suffer.

The United States Solicitor General aptly pointed out in his brief (September 1985, pg. 34) that "provoking the threat of foreign retaliation. . .would jeopardize the reciprocal exemption policy." The retaliatory conduct threat is substantial. In footnote 33 (September 1985 brief, pg. 34) he states:

> They (foreign governments) can levy artifically inflated "user fees," impose obstacles to repatriation of foreign earnings, route airlines to less desirable airports; refuse to let carriers use baggage handlers of choice; give local airlines preference in carrying air cargo; restrict United States airlines' local advertising; or impose excessively complicated customs procedures or other delays and inconveniences. See U.S. Civil Aeronautics Board, FT 1967 Report to Congress 103-108 (1977).

[2]In the Appendix of the Brief for the United States as Amicus Curiae (Case Nos. 84-902, 84-922, and 84-1041, September 1985, are 25 diplomatic notes (Appla-85a); and in Amicus Juridsictional Statement Appendix is a Jamaican diplomatic note (MFA Note No. 558/5055).

Clearly there is no limitation on retaliation. It foreseeably could reach all modes of transportation and all areas of trade.

Although the United States Solicitor General states that reciprocal exemptions are a matter of strong federal policy, amicus would suggest that these reciprocal international agreements are a matter of supremacy over state law and have equal dignity with federal law.

The American Law Institute clearly recognizes the status of international agreements between the United States and foreign states in its most recent draft of its foreign relations restatement wherein it states:

> International law and international agreements of the United States are law of the United States and supreme law over the law of the several states of the United States.

Restatement of the Law, Foreign Relations Law of the United States (revised), Tentative Draft No. 6, Vol. 1, §131 (April 12, 1985).

The genesis of the individual aviation service agreements of amicus was the Chicago Convention, an International Civil Aviation, executed by the United States on December 7, 1944, and ratified and approved by the United States Senate on August 9, 1946 (T.I.A.S. 159).

All of amicus are signatories of the Chicago Convention. This convention binds the United States and the government of amicus to implement various measures to facilitate air transportation between them. The ultimate product of this commitment is binding international air transportation service agreements. Each government, through these international agreements, is bound to grant reciprocal tax exemptions on

aviation fuel used in foreign commerce. There is no need for legislative enactment. The United States government has the responsibility to determine whether or not contracting nations grant fuel tax exemption to the United States carriers and must grant reciprocal right to other foreign government air carriers who do grant such exemption.

A rule of international law derives its status of law in the United States from its character as an international legal obligation of the United States. These reciprocal international agreements, if not "federal law," are binding and as such prohibit the state of Florida from taxing aviation fuel that propels the instrumentalities of foreign air commerce.

CONCLUSION

For these reasons, the court should declare Florida's aviation fuel sales tax unconstitutional as applied to Appellant and Amicus foreign airlines.

Respectfully submitted,

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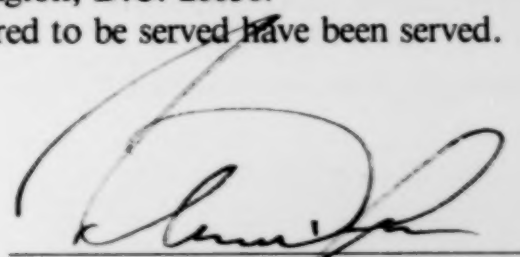
PROOF OF SERVICE

I, THOMAS W. LAGER, depose and say that I am attorney of record for Amicus, AIR JAMAICA LIMITED; AEROVIAS COLOMBIANAS LIMITADA; CARIBBEAN AIR CARGO CO., LTD.; GUYANA AIRWAYS CORPORATION; LINEAS AEREAS del CARIBE, S.A.; TACA INTERNATIONAL AIRLINES, S.A.; COMPANIA PERUANA de AVIACION "FAUCETT," S.A.; AERONAVES del PERU, S.A.; TRANSPORTES AEREOS MERCANTILES PANAMERICANOS, S.A., and that on December 18, 1985, I served a copy of the foregoing Brief of Amicus Curiae on each of the parties required to be served herein, as follows:

On Appellee, STATE OF FLORIDA, DEPARTMENT OF REVENUE, by mailing copies in duly addressed envelopes, with first class postage prepaid, to WILLIAM D. TOWNSEND, General Counsel, State of Florida, Department of Revenue, Room 203, Carlton Building, Tallahassee, Florida 32301; JOSEPH C. MELLICHAMP, III, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301; and to WALTER HANSEN, Esquire, Burwell, Hansen, Manley & Peters, 1762 Church Street, N.W., Washington, D.C. 20036.

All parties required to be served have been served.



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